

No. 332

Consolidated With No. 117, 118, 119, 333 and 334

Supreme Court of the United States

OCTOBER TERM, 1955

**APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

No. 117, No. 118, No. 119

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, ET AL.

UNION PACIFIC RAILROAD COMPANY, ET AL, Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION, ET AL.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE
COMMISSION AND SECRETARY OF AGRICULTURE, Appellants,

vs.

THE UNION PACIFIC RAILROAD COMPANY, ET AL.

**APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

No. 332, No. 333, No. 334

WASHINGTON PUBLIC SERVICE COMMISSION, PUBLIC
UTILITIES COMMISSIONER OF OREGON, ET AL, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

UNION PACIFIC RAILROAD COMPANY, CHICAGO AND NORTH
WESTERN RAILWAY COMPANY, ET AL., Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY,
ET AL.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE
COMMISSION, Appellants,

vs.

THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY.

**BRIEF OF THE PUBLIC SERVICE COMMISSION OF UTAH,
THE PUBLIC UTILITIES COMMISSION OF THE STATE OF
COLORADO, ET AL, INTERVENING APPELLEES IN CASES
No. 332, 333, and 334.**

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rates and charges via the route of the Rio Grande, through its Colorado and Utah gateways, between (a.) points on the Union Pacific Railroad and its connections north and west of Ogden, and in Idaho, Montana, Oregon, Washington and British Columbia, and, (b.) Colorado common points, such as Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, and points east thereof, and between Utah common points, such as Salt Lake City, Ogden and Provo, Utah, and the northwest territory served by the Union Pacific Railroad and its connections.

The intervening plaintiffs herein participated in the proceedings before the Commission as intervenors, or as interested parties, and testified to the need for joint rates as requested by the Complaint of the Rio Grande.

The hearings were had in 1949 and 1950 at Salt Lake City, Boise, Idaho, and Cheyenne, Wyoming, before an examiner of the Interstate Commerce Commission. In December, 1950, the examiner submitted his proposed report and order, and found that the Ogden gateway should be opened for all traffic, both East and West, originating or terminating in the so-called "Closed Door Territory." Among other things the examiner's report found:

"The record clearly shows that shippers and receivers of freight in localities and districts in Colorado and in Utah depending for railroad service solely upon the Rio Grande are unduly handicapped by the lack of such transportation arrangements and facilities, at joint through rates, which have become of great importance in modern merchandising. Establishment of joint through rates from and to points in the Northwest on the Union Pacific and its connections via Salt Lake City or Ogden in connection with the Rio Grande to and from Utah common points and to and from Colorado common points and points east thereof, are necessary and desirable in the public interest to permit communities located only upon the Rio Grande

to be adequately served by that railroad as part of the national transportation system.

Subsequently the Commission set this matter for oral argument after the submission of briefs by all parties. Argument was had, and the case was then re argued approximately a year later. On January 12, 1953, the Commission in a divided opinion handed down its order relative to the issues being adjudicated herein, both the Rio Grande and the Union Pacific, and their intervenors appealed this decision of the Commission to statutory three man courts in Nebraska and Colorado.

Intervenors, in supporting the Rio Grande, did not participate in the Nebraska case, but did appear, submit brief and argue the matter in the Colorado case.

QUESTIONS PRESENTED

1. Whether the Colorado Court erred in setting aside the order of the Interstate Commerce Commission on the grounds that the Commission erred as a matter of law in failing to find that through routes were already in existence and, therefore, applying an improper statutory standard in determining whether or not competitive joint rates should be prescribed as to all commodities moving over the Rio Grande and through the Ogden Gateway.

STATUTES INVOLVED

These appeals involve the following statutes:

The Interstate Commerce Act, Title 49 U.S.C., particularly the declaration of National Transportation Policy (preceding Section 1), and Sections 1(4), 1(5), 1(15), 3(1), 3(4), 6(1), 13(1), 15(1), 15(3), 15(4), and 15(8).

SUMMARY OF ARGUMENT

The statutory declaration of national transportation policy (U.S. Code, Title 49) as set out by the Congress of the

United States, provides among other things that there shall be "... fair and impartial regulation of all modes of transportation, subject to the provisions of this Act (Chapters 1, 8, 12 and 13 of this Title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical and efficient service, and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services without unjust discriminations, undue preferences or advantages or unfair or destructive competitive practices; . . ."

Section 1(4)—Title 49

"It shall be the duty of every common carrier, subject to this chapter, to provide and furnish transportation upon reasonable requests therefor, and to establish reasonable through routes with such carriers, and just and reasonable rates, fares, and charges and classifications applicable thereto; . . ."

The intervening parties herein seek through this case to obtain the transportation services which they feel they are entitled to as a matter of right, which right has been enunciated and promulgated by the Congress of the United States.

ARGUMENT

(A) The Colorado Case

The Colorado case involves the question of whether the Colorado Court was correct when it found that the Interstate Commerce Commission, in its majority opinion, did not properly apply the law to the facts as demonstrated by the record. This court in *Shield v. Utah, Idaho, Central Railway Company*, 305 U.S. 177, through Justice Holmes, speaking for the Court, set out the test, which must be followed in matters appealed from the Interstate Commerce Commission. In that case, he said:

"The condition which Congress imposed was that the Commission should make its determination after

hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The only remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. *Id.* That question must be determined upon the evidence produced before the Commission."

The Colorado Court concluded that the Commission's majority opinion misapplied the law as laid down in the case of *Thompson v. United States*, 343 U.S. 549, 556, 72 Supreme Court 978, or misapplied the facts as applicable to the law enunciated by the Thompson case. The Colorado Court said:

"We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." *Denver and Rio Grande Western R. R. Company v. United States*, 131 Federal Supp. 372, see 379.

The Colorado Court in applying the facts as disclosed by the record, to the applicable law, found that through routes do exist between the Rio Grande and the Union Pacific at Ogden. This fact was shown by the statements of counsel and witnesses for the Union Pacific, as well as by the commodities which were shipped over the through route. The Colorado Court adopted the following test in determining this fact:

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves

out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service." *Rio Grande Western R. R. Company v. United States*, 131 Federal Supp. 378.

To substantiate the application of this test by the Colorado Court, we wish to point out to this Court the direct testimony of one witness at the original hearing in dealing with the commodities shipped over the through route, which the Colorado Court found in existence.

Testimony of Herbert P. Heidel, of the Lincoln Packing Division of the American Stores:

"Q. There is a joint through rate published by the Union Pacific, and applicable by the Union Pacific, to Denver, or through Denver, and thence via any one of the three railroads that operate from Denver to Pueblo, is it not?

"A. That is right.

"Q. Then there are combination rates via Ogden, Utah, if the lambs move Union Pacific to Ogden, and then Denver and Rio Grande to Pueblo?

"A. That is right.

"Q. Which of those routes have you been using in the past years?

"A. In the past year, we used the rate from Ogden direct to Pueblo.

"Q. Does that make a higher per car charge than if you used the Union Pacific through Denver to Pueblo?

"A. It does.

"Q. Do you have any rough idea how much that would average per car?

"A. It averages about \$70.00 to \$80.00, I would say roughly, depending on the tonnage of the car handled.

"Q. Why do you use the Rio Grande route in view of that extra charge?

"A. Our experience in the past years indicated that we would be able to get delivery of the lambs more rapidly, and thus suffer less shrink, by using the D&RG from Ogden to Pueblo direct.

"Q. Is that because of the necessity of stopping the cars oftener when they move via Union Pacific for feed, then when they move via Ogden and the Rio Grande?

"A. If we move Ogden and the Rio Grande, we do not have to stop to feed between Ogden and Pueblo, that is right.

"Q. What happens if you move via the Union Pacific?

"A. With very few exceptions, we at least have to feed at Denver.

"Q. Do you buy these lambs on the Ogden market?

"A. A good portion of them, yes, sir." (R. 1 P. 412, 416.)

This direct testimony, we feel, is basic and certainly takes this case out from under the rule in the Thompson case, which the Interstate Commerce Commission misapplied in their order of January 12, 1953:

(B) Arbitrary Nature of Commission Order

The Commission's order is as follows:

"That it is necessary and desirable in the public interest, in order to provide adequate and more economic transportation, that through routes, and joint rates over such routes the same as apply over the Union Pacific and its connecting lines, defendants herein, be established via Ogden or Salt Lake City, in connection with the Rio Grande, on granite and marble monuments, in carloads,

from origins in Vermont and Georgia to destinations in the excluded territory in the northwest area as previously described herein, and on ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs, in carloads, from origins in the excluded territory to destinations in the United States south and east of a line drawn along the southern boundary of Kansas, thence the eastern boundary of Kansas to but not including Kansas City, thence immediately west of points on the Missouri River from Kansas City, Kansas, at Omaha, thence immediately north of points on the route of the Union Pacific and the Chicago & North Western from Omaha to Chicago, including destinations in the Lower Peninsula of Michigan and in Oklahoma and Texas."

This order indicates a lack of comprehension of the essential issues, or a compromise as to what the record disclosed when the Commissioners voted on this issue, because the commodities which the Commission did order the Union Pacific to file joint through rates on, are of such a divergent nature that they give rise to the suspicion that an illogical approach was made to the problem.

For example, a classification of livestock could be reasonable, a classification of fresh fruits and vegetables could be reasonable, frozen foods, poultry, butter and eggs, all of which commodities are of a perishable nature, would be a reasonable classification, but when the Commission, in conjunction with these perishable commodities, included dried beans, wheat and granite and marble monuments, the order becomes arbitrary and capricious.

The Interstate Commerce Commission is clothed with the duty and the obligation to implement the necessary administrative machinery and to protect these rights for the good of all of the shipping public and for the public interest.

The crying inequity of the Ogden situation is simply this. The Rio Grande Railroad operates generally between Denver

and Pueblo, Colorado, on the east, and Ogden, Utah, on the west. It traverses a vast segment of the state of Colorado and nearly all of the state of Utah, and in a sense parallels transcontinentally the Union Pacific to the north and the Santa Fe Railroad to the south.

Large numbers of people and many communities, local distribution points, and agricultural marketing centers are wholly dependent upon the Rio Grande for rail service; the pity being that even though the Rio Grande is ready, willing and able to do its duty for these shippers, it is precluded and prevented and estopped from rendering the type and kind of service which is essential to modern merchandising because the defendant, Union Pacific Railroad (which does not serve this territory at all), has failed and refused and continues to fail and refuse to enter into joint through rates on traffic moving over the Ogden gateway.

(C) Classification of Shippers and Needs

The intervening complainants can be classified into three groups, and by enumeration no preference for one as to the other is intended. Group one constitutes the shippers who reside north and west of Ogden, Utah, and are served by the Union Pacific Railroad. Group two consists of the shippers residing in Rio Grande territory between Ogden, Utah, on the one hand and Denver, Colorado Springs, Pueblo, Walsenburg, and Trinidad, Colorado, on the other hand. The third group consists of the shippers who reside south and east of the Colorado common points and are dependent upon other railroads for service, such as the Santa Fe, the Missouri Pacific, Rock Island, Colorado and Southern, and the Burlington.

Since these three groups have separate and distinct problems, we will treat them separately.

1. The requirements of agricultural shippers in the so-called "Closed Door Territory," consisting of points and places

north and west of Ogden, Utah, are such that they need—and the record amply demonstrates that they must have—rail service at joint competitive rates via the Rio Grande and its connections at the Colorado common points, in order that they may merchandise their products throughout the United States and not be excluded from any geographical section of the country.

Potatoes, fruit, livestock, wheat, beans and other commodities need to be moved from this territory.

For some unknown reason the Commission failed and refused to afford favorable consideration to lumber. This to us seems incomprehensible because the "Closed Door Territory" comprises the largest lumber producing section of the United States and there is adequate evidence in the record to demonstrate the need for lumber to move via the Rio Grande at competitive rates. The Commission's failure to include lumber was responsible for Commissioner Patterson submitting a concurring opinion relative thereto.

2. The second group consists of those people who reside along, or are served by, the Rio Grande Railroad, between Denver and Pueblo, Colorado, and Ogden, Utah. As heretofore stated, this constitutes a large segment of the geographical portions of these two states. Furthermore, it represents a territory which is rich in natural resources, abundant with agricultural production, and is today vital to the national defense of this nation.

We take the liberty to point this up because this record was originally made in 1949 and 1950. We feel that this court can take judicial notice of the fact that western Colorado and eastern Utah are the principal producers and processors of the essential ingredients of atomic or fissionable materials. Certainly, this area, which is served by the Rio Grande Railroad only, should be afforded the same type and kind of transportation which the Union Pacific to the north affords to the peoples and communities which it serves.

Basically the Public Utilities Commissions of the state of Colorado and the state of Utah recognize the need for joint through rates on any and all commodities which may have occasion to move into or out of this territory, and to that end intervened in behalf of the Rio Grande Railroad in this proceeding, because they felt that the opening of the Ogden gateway would best serve the public interest, which it is their duty to protect.

3. The last or third group comprises those people who are served by connecting railroads, that is railroads which connect with the Rio Grande at Denver, Colorado Springs, Pueblo and Trinidad. These railroads are the Santa Fe, the Missouri Pacific, the Rock Island, the Burlington and Colorado and Southern Denver and Fort Worth. These railroads serve the vast area between the Colorado common points, Missouri River points, Texas points, Mississippi River points, as well as connections from Illinois. Since all of these roads have their western terminus in Colorado (except the Santa Fe, which proceeds to southern California), it seems self evident that the transportation policy of this nation should be implemented to the extent that traffic moving via any of these roads will not be dead-ended, so to speak, on the west at the Colorado common points, or that at best be penalized by being required to carry a combination of local freight rates if such traffic moves westward beyond the Colorado common points.

CONCLUSION

This case has been before the Interstate Commerce Commission and the courts of this nation since 1949.

Exhaustive hearings have been had, briefs have been written, arguments have been made on both sides. The examiner, who was the tryer of the facts, held in favor of the Rio Grande and recommended that full relief be granted to the Rio Grande. The Commission, or at least a majority thereof, misapplied the law and granted only limited relief. The two statutory courts handed down divergent opinions.

The defendant, Union Pacific, has spread a tale of woe across this whole picture during all of this time, but the basic fact remains that the shipping public, whose interest is paramount, have not been afforded the relief which they are entitled to; relief which the national transportation policy of this country decrees they should have; relief which the Interstate Commerce Commission has the power to grant. Therefore, for the foregoing reasons the judgment of the District Court of the state of Colorado should be sustained, and the case should be remanded to the Interstate Commerce Commission to make findings in conformance with its duty under the law.

Respectfully submitted,

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333, and 334

PROOF OF SERVICE

I, John R. Barry, one of counsel of record for Intervenor herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of April, 1956, I served, on behalf of the Intervenor herein, copies of the foregoing Brief of Intervening Plaintiffs on the several parties to the appeals in Nos. 332, 333, and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff
Solicitor General of the United States
Department of Justice
Washington 25, D. C.

Stanley N. Barnes, Esq.
 Assistant Attorney General
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 Washington 25, D. C.

and with first-class postage prepaid to:

Donald E. Kelley, Esq.
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 Denver 1, Colorado.

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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4. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with first-class postage prepaid to:

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8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

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